TAN SIN HOH, RE: EX P; LEBEL LTD.

HIGH COURT MALAYA, PENANG
MOHD. DZAIDDIN J
[IN BANKRUPTCY NO. 162 OF 1985]
29 APRIL 1986

BANKRUPTCY: *Receiving and adjudication orders under ss. 6(2), 24(1) of the Bankruptcy Act 1967 - Act of bankruptcy - Section 3(1)(i) - Appeal - Wrong in law - Errors in registered particulars in the Registry of Businesses - Whether Court can go behind judgment to enquire into validity of the debt - Evidence of fraud, collusion or miscarriage of justice - Discretion of Court under s. 6(3) of the Act.*

The petitioning creditor applied to the Court for receiving and adjudication orders against the judgment debtor under s. 6(2) and 24(1) of the Bankruptcy Act 1967 ("the Act"). At the hearing of the petition on 31 March 1986, the debtor opposed the said petition and relied on his affidavit, contending that the judgment dated 8 May 1985 for RM62,220.77 which was entered against him in Penang High Court civil suit No. 436 of 1980 ("the 1980 judgment") was wrong in law because there were material errors in the creditor's claim which had influenced the deciding Judge to grant the creditor's application for an order that the debtor's defence be struck out.

This Court held that the judgment debt of 1980 had not been satisfied and that therefore the debtor had committed an act of bankruptcy under s. 3(1)(i) of the Act. The defendant contended that the material errors referred to earlier resulted in a miscarriage of justice and that the Court could go behind the decision of 8 May 1985 to enquire into the validity of the 1980 judgment debt.

The debtor also filed an application in the Supreme Court asking for leave to appeal out of time but that application was refused. This Court then held, on 8 May 1985, that the judgment debt of 1980 had not been satisfied and that therefore the debtor had committed an act of bankruptcy under s. 3(1)(i) of the Act. This is an appeal from that decision whereby the defendant is contending that the material errors referred to earlier resulted in a miscarriage of justice and that the Court could go behind the decision of 8 May 1985 to enquire into the validity of the 1980 judgment debt.

Held:

[1] The principle in *In Re Flatau; Ex Parte Scotch Whisky Distillers Limited* [1888] Vol. XXII QBD 83 is that the Court can go behind the judgment of any other Court and enquire into the validity of the debt if there is sufficient evidence before the Court of circumstances tending to show that there has been fraud, collusion or miscarriage of justice.

[2] On the facts and evidence in this case, there had been no fraud, collusion or miscarriage of justice and the Court was satisfied that the action against the debtor was thoroughly tried out and properly decided.

[3] The debtor had failed to show any sufficient cause to enable the Court to exercise its discretion in his favour under s. 6(3) of the Act.

Cases also referred to:

In Re Flatau; Ex parte Scotch Whisky Distilleries Limited [1888] Vol. XXII QBD 83
Ratnam v. Cumarasamy [1965] 31 MLJ 228
Hup Aik Tin Mining Company v. Kam Hoy Trading [1969] 1 MLJ 93 FC
Hong Kong Printing Company Sdn. Bhd. v. Lau Kooi Seng & Anor. [1986] CLJ (Rep) 368

Legislation referred to:
Bankruptcy Act 1967, ss. 3(1)(i), 6(2), (3), 24(1)
Registration of Businesses Rules 1957, r. 8(1), 14(6)
Registration of Businesses Act 1956, s. 6

For the judgment debtor - Ooi Teik Hoe; M/s. Ooi, Lee & Co.
For the judgment creditor - Mahinder Singh Dulku; M/s. Mahinder Singh Dulku & Co.

[**Editor's Note**: The Judgment Debtor has filed an appeal against the above decision.]

JUDGMENT

Mohd. Dzadiddin J:

In this petition, the petitioning creditor applied to this Court for receiving and adjudication. Orders against the judgment debtor under ss. 6(2) and 24(1) of the Bankruptcy Act 1967. Upon considering the creditor's petition (encl. 5) I found that the judgment debt of RM62,220.77 with interest thereon obtained by the Petitioning Creditor on 8 May 1985 in Penang High Court civil suit no. 436 of 1980 had not been satisfied. As such, the debtor had committed an act of bankruptcy under s. 3(1)(i) of the Act. Accordingly, I granted the orders as prayed for in the petition. The debtor has now appealed against my decision.

At the hearing of the petition, on 31 March 1986, the debtor opposed the said petition and relied on his affidavit (encl. 11) affirmed on 24 March 1986. His main ground was that the judgment for RM62,220.77 which was entered against him in civil suit no. 436 of 1980 was wrong in law because there was material error in the petitioning creditor's claim which had influenced the deciding Judge to grant the creditor's application for an order that his defence be struck out and judgment entered against him. He also blamed his former solicitors for not informing him about the decision because he would have appealed against the said decision in time. The debtor, however, did file an application in the Supreme Court asking for leave to appeal out of time, but the said application was refused. The next step he took was to issue a writ against the Registrar of Business, as a servant or agent of the Government of Malaysia, for damages in respect of a negligent certification of form PNA 23 dated 27 August 1980. (See: suit no.: 24-90-1986). So far, no statement of claim has been filed.

Mr. Ooi Teik Hoe, Counsel for the debtor, relied on the "material error" respecting the registered particulars in the Registry of Businesses. The material error related to the date of registration and the date showing compliance with r. 8(1) of the Registration of Businesses Rules 1957. He alleged that the particulars relating to this client's withdrawal from the partnership was wrongly registered on 23 August 1978 instead of 1 February 1976. However, acting on the particulars issued under r. 14(b), the creditors proceeded to apply for the defence to be struck out and judgment be entered against the debtor. Counsel submitted that this amounted to a miscarriage of justice and this Court could go behind the judgment to enquire into the validity of the debt. In support of his contention, Counsel relied on *In Re Flatau; Ex Parte Scotch Whisky Distillers Limited* [1888] Vol. XXII QBD 83. In that case, the bankruptcy petition on which the order was made was presented by the petitioning creditors, in respect of a debt, for which they had recovered judgment against a partnership firm, Flatau being adjudged to have been a partner in that firm. The judgment was obtained after a trial of the action before a Judge and a jury and the act of bankruptcy alleged was non-compliance with a bankruptcy notice in respect of the judgment debt. Flatau gave notice of appeal against the judgment, and the appeal was set down. The Registrar was asked to adjourn the hearing of the petition pending the appeal against the judgment, but he refused

to do so, and made a receiving order. Flatau appealed. Two points were taken up in the appeal. For the present case, the judgment of Lord Esher M.R. at p. 85 is relevant which reads as follows:

> Another point was taken - viz., that although an action has been tried by the proper tribunal, a Judge with a jury, and definite issues have been thoroughly tried out, and decided against the debtor, and judgment has been given against him accordingly, he against whom judgment has thus been given, without his being able to suggest that there was any miscarriage of justice at the trial, is entitled to go into the Court of Bankruptcy, even though he has appealed against the judgment, assert that the action was not properly tried, and say to the Registrar, you must try every one of the issues over again, upon the same evidence if I choose, or upon new evidence, and you have no discretion in this matter. **It is not necessary now to repeat that, when an issue has been determined in any other Court, if evidence is brought before the Court of Bankruptcy of circumstances tending to show that there has been fraud, or collusion, or miscarriage of justice, the Court of Bankruptcy has power to go behind the judgment and to inquire into the validity of the debt. But that the Court of Bankruptcy is bound in every case as a matter of course to go behind a judgment is a preposterous proposition.** There is no statute which imposes any such obligation on the Court of Bankruptcy; s. 7 does no more than give a judicial discretion.
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> The decision of the Registrar was quite right.
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> (Emphasis is mine)

Fry LJ, in the same case agreed with the opinion of Lord Esher and at p. 86 stated as follows:

> ....I entirely agree with what was said by Master of Rolls in *In re Saville* 4 Morrell 1 Bky. Rep. 277 at 279: "It seems to me that the case of *Ex parte Lennox* 16 QBD 315 shows, that the mere fact of a judgment having been recovered does not prevent the Court of Bankruptcy, if sufficient reasons are given for doing so, from going behind the judgment. **But it does not decide that, there being a judgment, on the mere suggestion of the debtor that the judgment is bad, the Court of Bankruptcy is bound to go behind the judgment and inquire into the validity of the debt.** (Emphasis is mine)

To summarise, the principle in *In Re Flatau* is simply that the Court can go behind the judgment of any other Court and enquire into the validity of the debt, if there is sufficient evidence before the Court of circumstances tending to show that there has been fraud, or collusion, or miscarriage of justice. In the present case, I was satisfied that the action against the debtor was thoroughly tried out and properly decided by my brother Judge. Further, it could be implied from the fact that the Supreme Court had rejected his application for leave to appeal out of time that he had failed to show merit or materials upon which the Court could exercise its discretion to grant leave to appeal. (*Ratnam v. Cumarasamy* [1965] 31 MLJ 228.) There was therefore no evidence of fraud, collusion or miscarriage of justice. As stated by Fry LJ (*supra*), *In Re Flatau* did not decide that there being a judgment which the debtor contended was bad because there was material error in the petitioning creditors' claim, this Court was bound to go behind the judgment and enquire into the validity of the debt. Even upon considering this material error, it was clear from s. 6 of the Registration of Businesses Act 1956 that the creditor was entitled to rely on the particulars recorded in the register of businesses kept in the Businesses Registry to ascertain whether the debtor remained as a partner of the firm at the time of the commencement of the suit, unless it was proved that the creditor was given notice of the dissolution of the partnership or that the debtor was not at the material time such a partner or associate. (See also: *Hup Aik Tin Mining Company v. Kam Hoy Trading* [1969] 1 MLJ 93 FC; *Hong Kong Printing Company Sdn. Bhd. v. Lau Kooi Seng & Anor.* [1986] CLJ (Rep) 368.

Therefore after having considered the petition as a whole, I was satisfied that the debtor had failed to show any sufficient cause to enable me to exercise my discretion in his favour under s. 6(3) of the Act. For these reasons, I granted the orders prayed for in this petition.

Also found at [1986] 2 CLJ 312